No. 85591-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY ROBERTS

RESPONDENT'S ANSWER TO AMICI CURIAE BRIEFS

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I. INTRODUCTION

Ignoring the substantial evidence of the father's "extreme anger, abuse, unreasonableness, and poor judgment" that was the basis for the trial court's foreign travel restrictions, amici manufacture claims of "fear-mongering," "xenophobia" and "blatant, explicit, and nakedly discriminatory stereotypes" based principally on statements in a "travel alert" issued by the U.S. State Department that were elicited by the father's attorney in cross-examination of the mother's expert. Amici then propose a means of eradicating this imagined bias that would paralyze the courts of this state whenever trial court judges are exposed to arguably inappropriate evidence. This Court should reject amici's unprecedented and unwarranted modification of established standards for reviewing discretionary evidentiary decisions in civil bench trials.

II. ARGUMENT

A. The Risk Factors Introduced Through The Mother's Expert Were Not "Prejudicial Ethnic Stereotypes" And Mirrored The Factors The Father Urged The Courts To Consider In His Second Appeal.

The trial court's consideration of risk factors was not an abuse of discretion. (*See* Resp. Supp. 18-20; COA Resp. 41-46) In fact, the father urged in his second appeal that the trial court be

directed to consider risk factors for abduction virtually identical to those identified by the mother's expert witness on remand. (Cause No. 59061-8-1, App. 29-39; *see also* COA Resp. 41-46, Appendix A) The mother's expert witness, Michael Berry, testified on remand that the existence of certain factors may be relevant to a determination of whether a parent poses a risk of abduction. Contrary to amici's claims (ACLU 12; Korematsu 3), these identified factors were not "prejudicial ethnic stereotypes":

1. Parent has threatened to abduct or abducted previously (IX RP 85)
2. Parent has strong ties to another country (IX RP 86)
3. Parent has family living in another country (IX RP 86)
4. Parent has no strong ties to the child's home state (IX RP 86)
5. Parent has no financial reason to stay in the area (IX RP 87)
6. Parent engaged in planning activities (IX RP 87)
7. History of domestic violence or lack of parental cooperation (IX RP 88)
8. Parent has prior criminal record (IX RP 88)
9. Parent feels alienated from legal system (IX RP 85)
10. Parent is suspicious or distrustful due to a belief abuse has occurred (IX RP 83)
11. Parent is paranoid or delusional (IX RP 84)
12. Parent is sociopathic (IX RP 84)

Only factors two and three are arguably related to whether a parent is foreign born. Berry did not testify that there would be a heightened concern for abduction if a parent met only one or two of the risk factors, but that if a parent presented "some" of the risk factors, it would be up to the trial court to weigh those risk factors against the facts to determine whether there indeed is a risk of abduction. (IX RP 67-68) Thus, contrary to amici's claims (ACLU 4, Korematsu 10, fn. 3), the father's "strong ties" to another country where he has family would not alone be a basis to find a risk of abduction.[1]

The Court must reject amici's claim that consideration of a parent's risk for abduction is "profiling," "racial stereotyping," or proof of "discrimination on the basis of national origin." (Korematsu 1, ACLU 6) Instead, these factors are "a summary of the wide variety of types of behaviors and characteristics that researchers

[1] The ACLU falsely asserts that "Berry also incorrectly referred to Brajesh as a citizen of India, and claimed in his assessment that that erroneous fact indicated a risk of abduction." (ACLU 4, *citing* X RP 23) Berry in fact testified: "It's my understanding that he had resigned his [Indian] citizenship at the time he became a U.S. citizen." (X RP 23) Further, Berry did not testify that the father's citizenship raised a risk of abduction, but that the court should consider (among other factors) that if the father were to "execute his threat" to take the children to India, where he was born and had family, "the difficulty of returning children from a country that does not have the same legal concepts, that will allow cooperation with an existing order." (X RP 22-23)

have found to be present. The risk factors are based on research that has been done during the last twelve years." Uniform Child Abduction Prevention Act (2006), Comment to § 7 "Factors to Determine Risk of Abduction." The trial court properly considered testimony on these risk factors in deciding whether there was a risk of abduction that warranted restrictions. In doing so, the trial court did exactly what the father urged in his second appeal.

B. The "Discriminatory" Evidence Amici Complain Of Was Elicited By The Father's Counsel.

Amici's constitutional challenge is not actually about Berry's testimony concerning risk factors for abduction, but instead focuses on a description of the current state of affairs in India as set out in a "travel alert" issued by the U.S. State Department that was admitted without objection as Exhibit 32 in the remand hearing. (X RP 8: "I'm not going to object to its admission, and I will just have some later questions about its probative value.") The mother offered Exhibit 32, and Berry's testimony, to show that the U.S. State Department has recognized that India is not a signatory to the Hague Convention, and that international child abduction is not a

crime under Indian law – facts that are undisputed. [2] (*See* Ex. 32 at 8; X RP 7) The testimony that amici find so objectionable was elicited by the *father's* counsel, who directed Berry to read from Exhibit 32 during cross-examination.[3]

Amici's complaints that Berry opined about terrorism, health issues, and road travel in India (ACLU 3-4, Korematsu 8-9), reflect a troubling lack of familiarity with the record in this case. Korematsu amici claim that Berry's testimony was an "unveiled reference to Hindus and Muslims." (Korematsu 8) The ALCU

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[2] Korematsu amici also complain that the trial court "relied too heavily on the fact that India is not a Hague signatory." (Korematsu 16) But the Hague treaty status of the country where a child might be taken is properly a factor for consideration. *See* ***Abbott v. Abbott***, __ U.S. __, 130 S.Ct. 1983, 1989, 176 L.Ed.2d 789 (2010) (benefit of Hague Convention is that it requires a prompt return remedy, to prevent the harms resulting from abductions); ***In re Rix***, 161 N.H. 544, 20 A.3d 326, 329 (2011) ("a foreign country's Hague Convention signatory status should be a significant factor for the trial court to consider, it cannot, standing alone, be determinative of whether it is in the best interests of a child to travel with a parent outside the country"); ***Lee v. Lee***, 49 So.3d 211, 214-215 (Ala. Civ. App. 2010) (affirming supervised visitation for mother who threatened to abduct children to Morocco, a non-Hague country); ***Abouzahr v. Matera-Abouzahr***, 361 N.J. Super. 135, 824 A.2d 268, 282, *certification denied,* 178 N.J. 34 (2003) ("The danger of retention of a child in a country where prospects of retrieving the child and extraditing the wrongful parent are difficult, if not impossible, is a major factor for a court to weigh in ruling upon an application to permit or to restrain out-of-country visitation."); *see also* Uniform Child Abduction Prevention Act, Section 7(a)(8); Fla. Stat. Ann. § 61.45 (4)(g)(1); Tex. Fam. Code Ann. § 153.502(b)(1), and COA Resp. 41-46, Appendix A.

[3] *Compare* Berry's testimony at X RP 10, 11, 12, 13, 14, 15, *with* Exhibit 32 at 2, 6-7, 8.

asserts that the testimony was "tinged with ethnic and national origin stereotyping," and "amounted to little more than fear-mongering and xenophobic statements that attempt to paint a picture of a country of 1.21 billion people with one broad brush stroke."[4] (ACLU 11, 14) But the mother was not the one who elicited Berry's testimony on these issues. Instead, Berry addressed these topics *only* in response to questioning by the father's counsel about Exhibit 32. (*See* X RP 10, 11, 12, 13, 14, 15, 21, 31) The father invited any error in the trial court considering this testimony by eliciting it. ***Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); ***Marriage of Blakely***, 111 Wn. App. 351, 360, 44 P.3d 924 (2002), *rev. denied,* 148 Wn.2d 1003 (2003); ***State v. Vandiver***, 21 Wn. App. 269, 273, 584 P.2d 978 (1978). Amici cannot rely on testimony the father himself elicited to claim that the father's constitutional rights were violated.

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[4] The ACLU also complains that Berry's acknowledgment that the father apparently has Indian friends, who live in "'primarily Indian cultural households' based on decorations, lifestyle, cooking, and furniture" (ACLU 4-5, *citing* X RP 26, 49) violated the father's associational rights, for "the advancement of belief and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." (ACLU 15) The mother never argued and the trial court did not find that the father's "association" with other Indians was a basis for restrictions. It was the father who on cross-examination elicited this testimony. (*See* X RP 26, 49)

C. Amici's Proposal That Reversal Be Constitutionally Compelled Whenever "Prejudicial Evidence" Is Presented In A Family Law Proceeding Is Wrong And Unnecessary.

Amici claim that Berry's testimony "inject[ed] a litigant's race or national origin into a trial proceeding" and "violate[d] [the father]'s due process rights because it calls for speculation based on his national origin." (Korematsu 1; *see also* ACLU 6-12) The ACLU then urges this Court to adopt a rule mandating reversal whenever such "prejudicial evidence" is presented during a bench trial unless the "beneficiary" of the evidence can prove "clearly and convincingly" that it did not "taint" the proceeding.[5] (*See* ACLU 16-19) The established rule is exactly the opposite of that proposed by amici. Appellate courts presume that the trial court disregards inadmissible or objectionable evidence in making its decision in a bench trial. ***State v. Read***, 147 Wn.2d 238, 245, 53 P.3d 26, 30 (2002) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions," *quoting*

[5] The ACLU's formulation of this proposed "test" reflects the same misguided view of this case as some sort of contest between parental gladiators that suffuses the father's e-mails (Ex. 15), his conduct, and his briefing. The courts make parenting decisions in the children's best interests and to protect them from potential harm; the mother is not the "beneficiary" of any evidence or rulings in this case.

Harris v. Rivera, 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981)).

All of the cases cited by amici for the proposition this Court must reverse because allegedly discriminatory evidence was admitted involved juries.[6] The courts' concern in all of these cases was that the evidence, or in some cases prejudicial statements by counsel during closing argument, was used as an appeal to a *jury's* prejudice or passion. As this Court has recognized, however, "judges in bench trials may be asked to exclude probative evidence

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[6] *See* ***State v. Monday***, 171 Wn.2d 667, 674, ¶ 11, 257 P.3d 551 (2011) (Korematsu 3) (prosecutor's prejudicial comments during closing argument to jury that "black folk don't testify against black folk" warranted reversal); ***Jinro America Inc. v. Secure Investments, Inc.***, 266 F.3d 993, 1007, *amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (ACLU 7) ("allowing an expert witness in a civil action to generalize that most Korean businesses are corrupt, are not to be trusted and will engage in complicated business transactions to evade Korean currency laws is tantamount to ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype"); ***Bird v. Glacier Elec. Coop., Inc.***, 255 F.3d 1136, 1150 (9th Cir. 2001) (ACLU 6-7) (counsel's closing argument to jury "was replete with appeals to bias, including references to Custer, slavery, the cavalry riding into town to kill, 'white man's magic,' the wealth of the Indian people being taken by the "conquering people'"); ***U.S. v. Cabrera***, 222 F.3d 590, 594 (9th Cir. 2000) (Korematsu 1, 2, 3) (testimony in jury trial regarding stereotypes about Cubans "appeal[ed] to racial, ethnic, or religious prejudice"); ***Bains v. Cambra***, 204 F.3d 964, 974-75 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000) (Korematsu 2, 3) (prosecutor's closing arguments to jury that "[I]f you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence," "invit[ed] the jury to give into their prejudices and to buy in to the various stereotypes that the prosecutor was promoting").

on the ground it is unfairly prejudicial. No judge could rule on such a request without considering the challenged evidence:"

> [T]he very nature of the duties of a judge often require him to have knowledge of inadmissible evidence. Every time he makes a ruling determining evidence inadmissible, he has to know what the inadmissible evidence consists of, and if he is the fact finder, he must eliminate this evidence from his consideration in determining the facts.

State v. Read, 147 Wn.2d at 245 (citations omitted). This Court in ***Read*** noted that "virtually no United States court has held this process [of presuming that the trial court disregarded inadmissible evidence] to be unfair." 147 Wn.2d at 245. The rule urged by amici would needlessly, unwisely, and unfairly undermine the trial court's role in determining the admissibility and credibility of evidence and as a gatekeeper to review.

Notably, every case cited by amici for the proposition that evidentiary "constitutional error" of the sort claimed to exist here mandates reversal is also a criminal case. (*See* Korematsu 5-8) This Court has recently rejected the argument that the same due process concerns attend the trial court's decisions in family law matters as when a defendant is charged with a crime or faced with the termination of parental rights. ***King v. King***, 162 Wn.2d 378, 394-95, ¶¶ 33-36, 174 P.3d 659 (2007). The rule urged by the

ACLU would be particularly impractical in family law cases, where trial courts are often presented not only with outrageous or inflammatory "evidence" that is relevant to *no* issue, but with evidence that would be inadmissible on one issue, but admissible for another.

For instance, whereas evidence of a party's personal failings cannot be considered in making a property distribution,[7] the same evidence may be admissible and relevant to parenting.[8] Far from presuming that the trial court's decision is necessarily "tainted" by improper evidence, this Court gives special deference to the trial court judge in family law cases. ***Marriage of Farmer***, __ Wn.2d __,

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[7] RCW 26.09.080 prohibits the trial court from considering "fault" in dividing the marital estate.

[8] For example, whether a spouse committed domestic violence or abused drugs during the marriage cannot be considered in distributing marital property, but is relevant under RCW 26.09.191 in making parenting decisions. The appellate courts presume that family law judges consider the evidence appropriately, and not for improper purposes. *See, e.g.*, ***Magnuson v. Magnuson***, 141 Wn. App. 347, 352, 170 P.3d 65, *rev. denied*, 163 Wn.2d 1050 (2007) ("the need of each child, not Robbie's transgender status, was the court's focus in determining residential placement. The court focused on the children's need for 'environmental and parental stability' in granting the majority of residential time to Tracy, a permissible statutory factor addressing the children's emotional needs"); ***Marriage of Clark***, 13 Wn. App. 805, 808-09, 538 P.2d 145, *rev. denied*, 86 Wn.2d 1001 (1975) (trial court admitted and considered evidence of husband's "profligate life style" "not for the purpose of establishing 'fault,' but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets").

¶ 24, 259 P.3d 256, 265 (2011); ***Marriage of Rideout***, 150 Wn.2d 337, 351-52, 359-60, 77 P.3d 1174 (2003); ***Parentage of Jannot***, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) ("in the area of domestic relations, the appellate courts have granted deference to the trial courts").

As this Court held in ***Read***, even in criminal cases the proper rule places the burden on the party objecting to evidence to show that the trial court's decision is "not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made." 147 Wn.2d at 245-46. Even if Berry's testimony could be considered "prejudicial," reversal is not warranted because the trial court did not rely on this evidence in making its decision.[9] There is nothing in the trial court's findings to suggest that the court was influenced by purportedly "biased" testimony regarding India or its citizens. Instead, "the trial court did not [ ] adopt Berry's risk factor analysis... The trial court did not identify any of these

[9] In allowing Berry to testify, the trial court stated: "I'm happy to hear this kind of expert testimony to assist me in making that determination which I, and I alone, will be making. And I am capable also of applying the appropriate weight to the testimony as I hear the cross examination, and I am able to review the admitted exhibits that pull together some of the literature, and listen to the witnesses' testimony with regard to that." (VIII RP 82)

factors as creating a risk of abduction and, it appears largely disregarded Berry's opinion about which risk factors applied. . . . [T]he court found that Brajesh's testimony and conduct alone supported the foreign travel restrictions. The court found that the risk of abduction still exists based on Brajesh's conduct and behavior, his apparent anger, and 'demonstrated willingness to punish,' independent of any risk factor analysis." ***Katare v. Katare***, 159 Wn. App. 1017, 2011 WL 61847 *12. (*See* Findings of Fact, CP 154-56)

D. Amici's New Challenge To The Standard For Review Of The Trial Court's Findings On Undisputed Foreign Law Is Baseless Here, Where The Court Was Not Asked To Apply Indian Law.

Korematsu amici raise for the first time a challenge to the trial court's treatment of Indian law as a factual issue, and complain that the Court of Appeals should have reviewed the trial court's finding that India does not have summary proceedings *de novo*. (Korematsu 13-16) Amici cannot challenge the standard of review used by the Court of Appeals in reviewing the trial court's findings of fact on Indian law because the father never raised this challenge in the Court of Appeals or in his petition for review in this Court. It is "well established that appellate courts will not enter into the

discussion of points raised only by amici curiae." ***Long v. Odell***, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). "[T]he case must be made by the parties and its course and issues involved cannot be changed or added to by friends of the court." ***City of Lakewood v. Koenig***, 160 Wn. App. 883, 886-87, fn. 2, 250 P.3d 113 (2011).

Korematsu amici argue that *de novo* review is warranted because "Exhibit 25 [on which the trial court relied in finding that "proceedings in India do not include summary proceedings"] misstates the holding in ***Dhanwanti Joshi v. Madhav Unde*** (1998) 1 SCC 112." (Korematsu 15) However, Exhibit 25, an excerpt from the book International Parental Child Abduction (1998), was admitted at trial without objection by the father, who did not dispute the representation of Indian law as described in Exhibit 25 or by Berry. (*See* IX RP 18) Nor did the father draw the trial court's attention to any alleged "misstatement" of the holding of ***Dhanwanti Joshi v. Madhav Unde***.

The Court of Appeals properly treated Indian law in this case as a factual issue, and reviewed the trial court's findings on Indian law for substantial evidence. The trial court was not being asked to *apply* foreign law, as was the case in ***Byrne v. Cooper***, 11 Wn. App. 549, 556, 523 P.2d 1216, *rev. denied*, 84 Wn.2d 1013 (1974)

(Korematsu 14), where the issue was whether the law of England or Washington governed a contract. Instead, the import of Indian law is solely factual – what safeguards, if any, are available if the father followed through with what the trial court found were credible threats to abduct the children to India. *See* ***Marriage of Akon***, 160 Wn. App. 48, 58-59, ¶¶ 27-31, 248 P.3d 94 (2011) (affirming trial court's finding that the parties' marriage in Sudan was valid based on substantial evidence, including the testimony of the parties); ***Perez v. Garcia***, 148 Wn. App. 131, 140, ¶ 18, 198 P.3d 539 (2009) ("information on the meaning of Mexican law" was a factual issue in a proceeding under the Hague Convention to have a child returned to Mexico).

Amici cannot challenge the trial court's findings based on evidence that was undisputed by the parties. ***Koenig***, 160 Wn. App. at 886, fn. 2; *see also* ***Adcox v. Children's Orthopedic Hosp. and Medical Center***, 123 Wn.2d 15, 25-26, 864 P.2d 921 (1993) (refusing to consider claim raised for first time on appeal that liability should have been apportioned between defendant hospital and doctors as a matter of law when hospital did not submit evidence of doctors' liability at trial). The father did not assign error to the trial court's findings on Indian law, and did not argue they

were erroneous in the Court of Appeals. *See* ***State v. Olson***, 126 Wn.2d 315, 320-21, 893 P.2d 629, 632 (1995) (the Court will not review an issue when there is "a complete failure of the appellant to raise the issue in any way at all-neither in the assignments of error, in the argument portion of the brief, nor in the requested relief.") The father did not raise the standard of review used by the Court of Appeal as a basis for review in this Court. ***Garth Parberry Equip. Repairs, Inc. v. James***, 101 Wn.2d 220, 225-26, fn. 2, 676 P.2d 470 (1984) (failure to raise a challenge in Petition for Review waives the challenge).

Even if the standard of review was *de novo,* the Court of Appeals properly concluded, based on the evidence that was presented at trial, that "proceedings in India do not include summary proceedings." (Finding of Fact, CP 156) Korematsu amici claim that Exhibit 25 proves that India has a "summary proceeding" available in the event of a child abduction. (Korematsu 15, *citing* Ex. 25 at 111 for the proposition that a party can petition a State High Court of India for a writ of habeas corpus against the abductor). But Exhibit 25 states that regardless of the theoretical availability of the writ, "[i]nternational child abduction law in India stands substantially modified in the matter of ***Dhanwanti Joshi v.***

Madhav Unde. . . ." (Ex. 25 at 113) There, the Indian Supreme Court held that such summary proceedings should only be held when a "grave risk of harm [is] established;" otherwise, "the court's overriding consideration must be the child's welfare." (Ex. 25 at 113) Therefore, "it is clear that the courts in India now would not exercise a summary jurisdiction to return children to the foreign country of habitual residence." (Ex. 25 at 113)

Finally, Korematsu amici complain that "unless this Court corrects this error, other parents of Indian descent will suffer from similar difficulties because the non-Indian parent would be able to point to the Court of Appeals decision explicitly denying that summary proceedings exist in India." (Korematsu 15) But the Court of Appeals decision does not state that there are no summary proceedings available in India. It instead recites the trial court's *unchallenged* findings that "abduction by a parent is not a crime in India, there is 'no guarantee of enforcing a U.S. parenting order in India,' such proceedings can take from six months to a year, and that the 'custody order of a foreign state is only one of the factors which will be taken into consideration by a court of law in India.'"

Katare, 159 Wash. App. 1017, 2011 WL 61847 *7.[10] Korematsu amici's "concern" for "other parents of Indian descent" is baseless, and ignores the trial court's real reason for its decision on remand – the father's abusive behavior that the trial court found was a threat to the children.

III. CONCLUSION

The interest of "mixed race children" in learning about and being exposed to "both halves of their cultural heritage" (Korematsu 18-19), cannot outweigh the courts' obligation to act in the children's best interests with restrictions reasonably calculated to address an identified harm of abduction. Amici's briefs reflect a profound unfamiliarity with the record in this case, presuming a bias in the decisions below that simply does not exist. It does a great disservice to the courts of this state to claim they have relied on "prejudicial ethnic stereotypes" or "nakedly discriminatory stereotypes" (Korematsu 9; ACLU 12) when in fact the courts below ignored inflammatory evidence elicited only by the father. This Court should reject amici's unwise remedies for imagined concerns.

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[10] Amici's concerns are baseless for the additional reason that the Court of Appeals' third decision in this case is unpublished; it cannot be relied on as authority. ***Johnson v. Allstate Ins. Co.***, 126 Wn. App. 510, 519, ¶¶ 24-25, 108 P.3d 1273 (2005); GR 14.1(a).

Dated this 2nd day of November, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 2, 2011, I arranged for service of Respondent's Answer to Amici Curiae Briefs, to the Court and to counsel for the parties to this action as follows:

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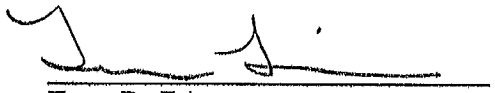

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